

FOR A GOOD CAUSE: REFORMING THE GOOD CAUSE
EXCEPTION TO NOTICE AND COMMENT RULEMAKING
UNDER THE ADMINISTRATIVE PROCEDURE ACT

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INTRODUCTION

Suppose you serve as Assistant Chief Counsel for the Federal Aviation Administration (“FAA”) in the wake of the tragic events of September 11, 2001.¹ Tensions are high at the FAA: the horrors of 9/11 are still fresh in the collective consciousness and fears of another terrorist attack keep FAA officials awake at night. As a result, the FAA, with help from the newly created Transportation Security Administration (“TSA”), is looking to close down any potential areas of breach in their security procedures. Your office is busy providing the legal advice and means to help the FAA implement its new security measures.

Less than a year removed from 9/11, the FAA receives credible reports from the TSA that a number of FAA-certified pilots pose a serious security threat.² As the law currently stands, the FAA may issue an emergency order revoking a pilot’s certificate if the Administrator determines after investigation that such action is required for “safety in air commerce” and “the public interest.”³ However, officials at the FAA and the TSA feel that the interests of national security require a speedier and more streamlined process and propose new regulations requiring the *automatic* suspension by the FAA of the pilot’s certificates when the TSA determines that he or she poses a security risk.⁴ Clearly, in national security matters, time is of the essence.

When FAA officials come to your office with this new proposed regulation, you break out the Administrative Procedure Act (“APA”) and explain to them that the agency cannot issue a new regulation without following certain administrative procedures. Namely, the agency must follow a three-step process that consists of notice of the proposed rulemaking, re-

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¹ The following fact pattern is based on the facts set out in *Jifry v. Federal Aviation Administration*, 370 F.3d 1174 (D.C. Cir. 2004).

² *See id.* at 1177.

³ 49 U.S.C. § 44709(b)(1)(A) (2006); *see also Jifry*, 370 F.3d at 1176.

⁴ *See Jifry*, 370 F.3d at 1179.

ceipt of comments from the public, and the issuance of the final rule.⁵ In the past, “notice and comment” rulemaking took several months or even years to complete;⁶ but this is simply unacceptable to FAA officials concerned that a terrorist strike may occur at any given moment.

Fortunately, you are aware of a certain APA provision that may help these officials. Under APA Section 553(b)(B), an agency is exempt from such requirements if it “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁷ You advise the FAA officials that courts typically uphold such good cause findings in emergency situations such as the one here.⁸ Relieved, FAA officials promulgate the new regulations, which are made effective immediately without notice and comment, citing the good cause exception in APA Section 553(b)(B).⁹

While the situation just described constitutes the relatively easy case where good cause may excuse standard notice and comment procedure, it is less clear whether good cause can be evoked in situations of considerably less urgency. A federal agency may always find reasons to expedite the promulgation of its rules, but the procedures prescribed by the APA for agency rulemaking are not mere formalism; they serve useful and even democratic purposes.¹⁰ The opportunity for the public to comment on proposed rules helps create better quality rules, by virtue of the input of all interested parties, while also increasing the political accountability of an administrative agency that would otherwise be unaccountable to the public.¹¹ Furthermore, allowing parties potentially affected by such rules to participate in their fashioning is important to fundamental fairness.¹² For all these reasons, courts are often hesitant to exempt an agency from notice and comment for a “good cause” that is not predicated on a true emergency.¹³

⁵ 5 U.S.C. § 553(b)-(d) (2006).

⁶ RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 58 (2008).

⁷ 5 U.S.C. § 553(b)(B).

⁸ *See, e.g.*, *United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010) (citing *Jifry*, 370 F.3d at 1179).

⁹ *See Jifry*, 370 F.3d at 1179-80 (holding that the FAA had good cause to promulgate a rule without notice and comment “[g]iven [the FAA’s] legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001”).

¹⁰ *See* Ellen R. Jordan, *The Administrative Procedure Act’s “Good Cause” Exemption*, 36 ADMIN. L. REV. 113, 116-17 (1984) (“Agencies which listen and respond to public comment enhance their legitimacy and accountability, both of critical importance when decisionmaking is delegated to a nonrepresentative, politically insulated body.”).

¹¹ PIERCE, *supra* note 6, at 62-63.

¹² Jordan, *supra* note 10, at 116.

¹³ *See* N.J. Dep’t of Env’t Prot. v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (“[I]t should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced.”).

This Comment maintains that the good cause exception to the notice and comment procedure should be read narrowly, to effectuate the purposes of the APA and the beneficial aspects of informal rulemaking. To this end, the language of Section 553(b)(B)'s good cause exception should be modified to provide better guidance and constrain the use of the exception in all but a few necessary cases. Agencies should also be required to publish a formal statement of reasons justifying their good cause findings and be obliged to allow opportunity for public comment after an interim rule has been issued under the good cause exception. Finally, courts should adopt a *de novo* standard when reviewing agency good cause findings. This Comment uses as a test case the recent circuit split over this issue in the context of the Attorney General's recent issuance of a regulation making the Sex Offender's Registration and Notification Act ("SORNA") retroactive to pre-SORNA sex offenders, *sans* notice and comment.

Part I of this Comment discusses the APA's notice and comment requirements for informal rulemaking, identifying the costs and benefits of public participation. Part I also examines the good cause exception and the various legislative proposals to amend the exception in past years. Part II analyzes the good cause exception in practice, reviewing relevant case law interpreting the exception and educing certain principles and trends. Part III provides relevant background for the recent circuit split over SORNA's retroactive applicability, and then evaluates the competing approaches to the problem. Part IV recommends some proposed changes to the statutory language of the good cause exception, as well the adoption of certain additional procedural measures. Part V applies these proposals in the context of the SORNA circuit split and to a case representing the "totality of the circumstances" approach to judicial good cause evaluations.

I. BACKGROUND

A. *The Administrative Procedure Act and Informal Rulemaking*

Government agencies today play an indispensable role in our government. Most federal agencies possess a broad range of powers within their assigned area of responsibility, including the power to issue legislative rules that have the same legally binding effect as statutes.¹⁴ In giving agencies this power, Congress made an assessment that agencies would do a better job in issuing rules of conduct within their own areas of expertise.¹⁵

Generally, agency rulemaking is subject to certain procedures outlined in the Administrative Procedure Act of 1946, which Congress passed in

¹⁴ PIERCE, *supra* note 6, at 1.

¹⁵ *Id.* at 1-2.

order to increase the degree of uniformity among agencies.¹⁶ Sections 556 and 557 provide the procedures an agency must use in a process known as formal rulemaking, which involves an oral evidentiary hearing and is similar to a judicial trial.¹⁷ Because of its cumbersome and time-consuming nature, formal rulemaking has largely fallen out of favor and is only used when Congress requires oral hearings by statute.¹⁸

In lieu of formal rulemaking, an agency that plans to promulgate a new legislative rule must: (1) publish a Notice of Proposed Rulemaking (“NOPR”); (2) provide an opportunity for interested members of the public to comment on the rule; and (3) issue a final rule accompanied by a statement of its basis and purpose.¹⁹ This notice and comment procedure is outlined in Section 553 of the APA and is known as informal rulemaking.²⁰ In contrast to formal or common-law style adjudicatory rulemaking, informal rulemaking is a more efficient, relatively quicker, and inexpensive way of issuing a rule.²¹

Additionally, the notice and comment procedure reflects Congress’s preference for public participation in informal rulemaking.²² Courts and commentators have identified a number of advantages to requiring agencies to provide the public an opportunity to participate in the fashioning of their rules.²³ First, notice and comment procedures can be expected to produce higher quality rules, as a result of the participation of all interested members of the public in the decisionmaking process.²⁴ Second, public participation in agency rulemaking ensures the fair treatment of persons affected by the rule, since all parties potentially affected have a chance to participate,

¹⁶ *Id.* at 3.

¹⁷ 5 U.S.C. §§ 556-557 (2006); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.2, at 562 (5th ed. 2010).

¹⁸ Melissa M. Berry, *Beyond Chevron’s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 543-44 (2007); *cf.* *Corn Prods. Co. v. Dep’t of Health, Educ. & Welfare*, 427 F.2d 511, 513 n.5 (3d Cir. 1970) (listing the procedural hurdles associated with the FDA’s use of formal rulemaking to decide whether peanut butter should contain 90% or 87.5% peanut products).

¹⁹ 5 U.S.C. § 553(b)-(d).

²⁰ *Id.*; PIERCE, *supra* note 17, § 7.1, at 557.

²¹ PIERCE, *supra* note 6, at 61.

²² *See* Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 369 (1972) (asserting that the need for public participation in notice and comment procedure is “axiomatic”); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 334 (1989).

²³ *United States v. Utesch*, 596 F.3d 302, 308-09 (6th Cir. 2010) (quoting *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 678, 680 (6th Cir. 2005)); PIERCE, *supra* note 17, § 6.8, at 496-501.

²⁴ *Utesch*, 596 F.3d at 308-09 (quoting *Dismas Charities*, 401 F.3d at 678, 680); PIERCE, *supra* note 17, § 6.8, at 496-97.

and the resulting rules are clearer and more explicit than rules adopted through adjudication.²⁵

Finally, notice and comment procedures give affected parties the ability to participate and influence agency decisionmaking at an early stage, which promotes the political accountability of the agency.²⁶ When an agency issues public notice of its proposed rule, citizens who support or oppose the proposal have the opportunity to express their views to the President and members of Congress.²⁷ These elected officials, in turn, can influence and oversee the agency's proposed plan.²⁸ As a nonelected political body, the agency's very legitimacy is dependent upon its openness and amenability to the needs and ideas of the public.²⁹

In addition to Section 553's three-step notice and comment procedure, the APA also requires a delay of at least thirty days after publication of the final rule before it becomes effective.³⁰ This provision allows parties potentially affected by the rule adequate time to conform their conduct to it.³¹

B. *The Good Cause Exception*

1. Overview

While the APA's requirements of prior notice and opportunity for comment apply to informal rulemaking generally, Congress has carved out several exceptions where the benefits gained from public participation are outweighed by other circumstances.³² For example, agencies are exempt from the notice and comment procedure when issuing interpretative rules and policy statements.³³ APA Section 553(a) also exempts rules that involve specific subject matter, including "a military or foreign affairs function of the United States; or . . . a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."³⁴

An agency is also exempt from the informal rulemaking process if the agency states a "good cause" for issuing the rule without complying with

²⁵ *Utesch*, 596 F.3d at 308-09 (quoting *Dismas Charities*, 401 F.3d at 678, 680); PIERCE, *supra* note 17, § 6.8, at 500-01.

²⁶ *Utesch*, 596 F.3d at 308-09 (quoting *Dismas Charities*, 401 F.3d at 678, 680); PIERCE, *supra* note 17, § 6.8, at 497.

²⁷ PIERCE, *supra* note 17, § 6.8, at 497.

²⁸ *Id.*

²⁹ See *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (noting that an agency's ultimate authority derives from the public).

³⁰ 5 U.S.C. § 553(d) (2006).

³¹ *United States v. Cain*, 583 F.3d 408, 423 (6th Cir. 2009).

³² See, e.g., 5 U.S.C. § 553(a), (b)(A)-(B).

³³ 5 U.S.C. § 553(b)(A), (d)(2).

³⁴ 5 U.S.C. § 553(a)(1)-(2).

notice and comment procedures.³⁵ In drafting the good cause exception, Congress recognized that, despite the advantages of public participation, an agency might encounter exigent circumstances that call for prompt action where notice and comment procedures may prove too costly and introduce unnecessary delay in promulgating a legislative rule.³⁶ In such situations, the importance of public participation is outweighed by the countervailing importance of efficient and effective implementation, and to force an agency to strictly comply with rulemaking procedure may be overly formalistic or detrimental to the rule's purpose.³⁷

Under APA Section 553(b)(B), an agency can invoke "good cause" only where the notice and comment procedure is "impracticable, unnecessary, or contrary to the public interest."³⁸ These grounds for a good cause exception are defined in the Senate Judiciary Committee Report on the APA:

"Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.³⁹

While these definitions suggest separate categories, in practice, agencies and courts tend not to precisely distinguish the three standards.⁴⁰ Particularly, "impracticable" and "contrary to the public interest" often cover the same ground.⁴¹ More importantly, the APA's legislative history supports a narrow reading of the good cause exception, eliminating any idea that agen-

³⁵ 5 U.S.C. § 553(b)(B). This Comment is concerned solely with the good cause exception to informal rulemaking.

³⁶ See Jordan, *supra* note 10, at 117-18.

³⁷ See Lavilla, *supra* note 22, at 319-21.

³⁸ 5 U.S.C. § 553(b)(B). The APA also has a separate (and distinct) good cause provision exempting a rule from the thirty-day delay requirement. See *id.* § 553(d). Courts disagree as to whether the good cause exemption in Section 553(d) differs from the good cause exemption in Section 553(b)(B). Compare *New Jersey v. EPA*, 626 F.2d 1038, 1048 (D.C. Cir. 1980) (observing that the plain language of the APA reveals structural separation between two exemptions), and *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-90 (7th Cir. 1979) (holding that Section 553(d)(3) is a narrower standard than Section 553(b)(B)), with *Buschmann v. Schweiker*, 676 F.2d 352, 356 (9th Cir. 1982) (finding that when good cause exists under Section 553(b)(B), it also exists under Section 553(d)(3) to exempt the rule from the thirty-day delay requirement).

³⁹ S. DOC. NO. 79-248 §4(a) (1946), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944-46, at 200.

⁴⁰ See Lavilla, *supra* note 22, at 351 (noting that the "formalistic" approach to the good cause exemption is not followed in administrative practice or by courts (internal quotation marks omitted)).

⁴¹ See Jordan, *supra* note 10, at 118-19 (internal quotation marks omitted).

cies may treat the exemption as an “escape clause” from the APA’s notice and comment procedures.⁴²

2. Proposed Amendments to Section 553(b)(B)

Since its drafting in 1946, the phrasing of the good cause exception has been reconsidered by Congress a number of times for being “unsatisfactory”; lacking specificity; providing only limited guidance; and being inconsistent with the public policy behind notice and comment procedures.⁴³ However, the original wording of the statute still stands despite numerous proposals for amendment.⁴⁴ A brief look at some of the proposed amendments will help clarify the shortcomings of the current language as well as its meaning as understood by Congress.

In 1955, a congressional committee proposed a change in the good cause exemption that would limit it to cases where “immediate adoption of the rule is necessary for the preservation of the public health, safety, or morals.”⁴⁵ In 1963, Congress attempted to limit the good cause exemption only to emergency situations, excising the impracticable and unnecessary standards and leaving only the “contrary to public interest” standard.⁴⁶ The American Bar Association (“ABA”) also proposed an amendment that would allow for the adoption of “temporary emergency rules” when compliance with normal notice and comment procedures would be contrary to the public interest, or if the agency found “imperative necessity for preservation of public, health, safety or welfare.”⁴⁷

In 1982, the Senate Judiciary Committee once again attempted to modify the good cause exemption by limiting it to only two situations: “when any delay in issuing a rule would seriously injure an ‘important public interest,’ or where public participation would seriously injure a person or class of persons without serving any important public interest.”⁴⁸ A year later, the House of Representatives considered a bill with text that mirrored the Senate Judiciary Committee’s recommendations with the addition of

⁴² See *id.* at 119 (internal quotation marks omitted) (citing S. DOC. NO. 79-248 §4(a) (1946), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944-46, at 200); Layne M. Campbell, Comment, *Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes “Good Cause” Under the Administrative Procedure Act*, 1980 BYU L. REV. 93, 96 (1980) (citing S. REP. NO. 79-752, at 14 (1945)).

⁴³ S. REP. NO. 97-284, at 108 (1981); see also Lavilla, *supra* note 22, at 324.

⁴⁴ See Lavilla, *supra* note 22, at 324.

⁴⁵ *Id.* (quoting H.R. DOC. NO. 84-107, at 365 (1955)) (internal quotation marks omitted).

⁴⁶ *Id.* at 325 n.31 (citing S. 1663, 88th Cong. § 4 (1963)).

⁴⁷ *Id.* at 324 n.30 (citing S. 2335, 88th Cong. § 1003(d) (1963)).

⁴⁸ *Id.* at 325-26 (quoting S. REP. NO. 97-284, at 107 (1981)).

another category: the good cause exception would also apply when delay would “substantially frustrate legislative policies.”⁴⁹

Although Congress failed to make these proposed modifications, the various attempts to restrict or otherwise qualify the good cause exception indicate an awareness by at least a few members of Congress that the language of Section 553(b)(B) is excessively broad and provides too much discretion to agencies.⁵⁰

3. Statement of Reasons

In addition to the requirement that an agency find a good cause in order to exempt its rule from notice and comment procedure, Section 553(b)(B) requires agencies to “incorporate[] the finding [of good cause] and a brief statement of reasons therefor in the rules issued.”⁵¹ Whether the failure to include a formal “statement of reasons” invalidates the agency rule at issue is a controversial and unresolved issue among courts that have reached the question.⁵² Some courts have found that compliance with this provision is necessary to uphold the agency’s invocation of the good cause exception;⁵³ others have found good cause even where an agency fails to include a statement of reasons with its rule.⁵⁴

Courts have held that agency statements of reasons must be specific; a bald assertion that a rule is exempt from notice and comment for good cause is not sufficient.⁵⁵ Furthermore, some courts require agencies to publish the statement of reasons concurrently with the rule, finding post hoc rationalizations to be suspect.⁵⁶

⁴⁹ *Id.* at 326 (quoting H.R. 1776, 98th Cong. (1983)) (internal quotation marks omitted).

⁵⁰ *See* Lavilla, *supra* note 22, at 326-27 (suggesting that although Congress has not modified the good cause exemption within the APA, it has specified other exemptions paralleling good cause considerations in legislation such as the Interstate Commerce Act and the Emergency Price Control Act).

⁵¹ 5 U.S.C. § 553(b)(B) (2006).

⁵² Lavilla, *supra* note 22, at 399 (internal quotation marks omitted).

⁵³ *Id.* (citing *Standard Oil Co. v. Dep’t of Energy*, 596 F.2d 1029, 1062 (Temp. Emer. Ct. App. 1978); *Kelly v. Dep’t of Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972)).

⁵⁴ *Id.* at 400 (citing *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1333 (Temp. Emer. Ct. App. 1974); *Am. Med. Ass’n v. Bowen*, 659 F. Supp. 1143, 1152 (N.D. Tex. 1987)).

⁵⁵ *Id.* at 402 (citing *Consumer Energy Council v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982); *Nat’l Nutritional Foods Ass’n v. Kennedy*, 572 F.2d 377, 384 n.12 (2d Cir. 1978)).

⁵⁶ *Id.* at 402-03 (citing *Buschmann v. Schweiker*, 676 F.2d 352, 356-57 (9th Cir. 1982); *Kollett v. Harris*, 619 F.2d 134, 144 & n.14 (1st Cir. 1980); *Kennedy*, 572 F.2d at 384).

II. THE GOOD CAUSE EXCEPTION IN PRACTICE

A. *Judicial Construction of the Good Cause of Exception*

While a finding of good cause depends largely on the individual facts in each case and is necessarily of an “ad hoc quality,”⁵⁷ some patterns emerge from an analysis of the case law. On the whole, judicial decisions recognize an agency’s reliance on the good cause exemption in three situations: (1) where there is an immediate threat to the public health, safety, or welfare; (2) where prior notice of a proposed rule causes harm and frustrates the purpose of the rule; and (3) where Congress has explicitly or implicitly exempted a specific rule from informal rulemaking procedure.⁵⁸ A close examination of each of these categories suggests some general principles of construction that should prove useful in applying the good cause exception in future cases.

1. Immediate Threat to Public Health, Safety, or Welfare

Agencies often cite the urgency of a particular problem that needs to be addressed through expedient rulemaking to avoid notice and comment procedure.⁵⁹ Courts, however, have not upheld good cause findings in every instance where an agency faces an urgent situation, as that would encourage the agency to use the good cause exception as an “escape clause,”⁶⁰ contrary to congressional intent. Rather, courts have looked for the existence of an emergency situation that poses an immediate threat to public health, safety, or welfare.⁶¹

The inquiry into whether an emergency situation exists sufficient to dispense with informal rulemaking procedure can be broken down into two steps. First, courts will examine the nature of the interest that is threatened.⁶² Second, courts will determine whether that situation warrants a departure from normal APA procedure.⁶³ Ultimately, agencies and courts “engage in a balancing exercise” that is “contextual and relative” in order to determine the appropriateness of using the good cause exception.⁶⁴

⁵⁷ Jordan, *supra* note 10, at 120.

⁵⁸ See PIERCE, *supra* note 17, § 7.10, at 672-76.

⁵⁹ *Id.* at 672.

⁶⁰ Campbell, *supra* note 42, at 96 (internal quotation marks omitted) (citing S. REP. NO. 79-752, at 14 (1945)).

⁶¹ See *United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010); Lavilla, *supra* note 22, at 363; Campbell, *supra* note 42, at 100.

⁶² See Lavilla, *supra* note 22, at 363.

⁶³ See *id.*

⁶⁴ *Id.*

In examining the nature of the situation, courts have found good cause only where the situation prompting the rule is new or presents a new fact that justifies the agency's concern.⁶⁵ If the agency is addressing a chronic situation on the basis of a good cause emergency, then the agency's own negligence in addressing the situation weighs against finding an urgent reason for exempting notice and comment procedure.⁶⁶

Additionally, the situation that justifies an agency's finding of good cause should be sufficiently urgent or immediate that public participation is made effectively impossible. One factor courts take into account is the amount of time the agency has to promulgate a rule.⁶⁷ Another is whether the agency acted diligently in reacting to the situation,⁶⁸ with consideration given to the foreseeability of the situation and the complexity of the rule.⁶⁹

Immediate threats to human life and physical security typically constitute an important enough interest to justify use of the good cause exception. In *Hawaii Helicopter Operators Ass'n v. Federal Aviation Administration*,⁷⁰ the FAA issued new air-safety regulations without notice and comment procedure in response to a spate of helicopter air-tour accidents.⁷¹ In justifying its decision, the FAA offered specific facts that indicated that there was an urgent threat to public safety, including the fact that there had been twenty air-tour accidents and twenty-four fatalities within the last three years.⁷² The court noted that it perceived no other motive in waiving notice and comment and held that the FAA's finding of good cause was valid.⁷³

In contrast, the protection of human health was not a sufficient ground to find good cause where the evidence of a threat to human health was not compelling. In *Texas Food Industry Ass'n v. United States Department of Agriculture*,⁷⁴ the Department of Agriculture (the "Department") dispensed with normal notice and comment procedure when imposing a new labeling

⁶⁵ See *id.* at 371 (quoting *Am. Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395, 401 n.7 (D.D.C. 1983)).

⁶⁶ See *id.*

⁶⁷ Compare *Consumers Union of the U.S., Inc. v. Sawhill*, 393 F. Supp. 639, 641 (D.D.C.) (finding a period of one month and two days sufficient for notice and comment rulemaking and denying a finding of good cause), *aff'd sub nom. Consumers Union of the U.S., Inc. v. Zarb*, 523 F.2d 1404 (Temp. Emer. Ct. App. 1975), with *Phila. Citizens in Action v. Schweiker*, 669 F.2d 877, 882-83 (3d Cir. 1982) (finding a 49-day period to be insufficient to fully comply with notice and comment rulemaking).

⁶⁸ See *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) ("Otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures.").

⁶⁹ See Lavilla, *supra* note 22, at 370-71.

⁷⁰ 51 F.3d 212 (9th Cir. 1995).

⁷¹ *Id.* at 214.

⁷² *Id.*

⁷³ *Id.* at 214-15.

⁷⁴ 842 F. Supp. 254 (W.D. Tex. 1993).

requirement for uncooked and partially cooked meat and poultry products.⁷⁵ The Department cited fear of E. coli contamination and continuing evidence of undercooked hamburgers to support its finding of a public health emergency.⁷⁶ The court held that the Department failed to justify its use of the good cause exception, noting that the outbreak of the E. coli illness had occurred in a geographically isolated area and was the result of mishandling by fast food chains and not consumers.⁷⁷

Another interest protected by the good cause exception is the protection of the economic health of the country as a whole. During the Arab oil boycott of the early 1970s, the Federal Energy Office (“FEO”) issued a rule, without notice and comment, prohibiting gas-station operators from reserving their available fuel for regular customers.⁷⁸ The Emergency Court of Appeals in *Reeves v. Simon*⁷⁹ held that this agency action fell within the good cause exception.⁸⁰ It explained that the FEO’s actions were occasioned by the violence that had occurred at retail gas stations as a result of the fuel shortage, which constituted a national emergency that required immediate action.⁸¹

2. Harm Caused by Prior Notice

Courts have also upheld an agency finding of good cause when the agency believes that the objective sought by the rule would be frustrated by prior public notice.⁸² This situation is common in many areas of economic regulation.⁸³ For example, if an agency seeks to remove a price ceiling for a particular product to spur sales, the product manufacturer will have the incentive to withhold the product until the agency takes its expected action. In such a case, it would clearly be “impracticable” for the agency to announce its proposed rule ahead of time, as it would defeat the purpose of the rule itself.

Like the emergency situations that pose an immediate threat to the public health, safety, or welfare, this category of cases also requires an examination of the interests that are likely to be harmed by prior notice of the rule, balancing them with the preference for public participation in informal rulemaking to decide if a good cause exception is warranted.⁸⁴

⁷⁵ *Id.* at 256-57.

⁷⁶ *Id.* at 257.

⁷⁷ *Id.* at 260.

⁷⁸ *Reeves v. Simon*, 507 F.2d 455, 457-58 (Temp. Emer. Ct. App. 1974).

⁷⁹ 507 F.2d 455 (Temp. Emer. Ct. App. 1974).

⁸⁰ *Id.* at 458.

⁸¹ *Id.* at 459.

⁸² *PIERCE*, *supra* note 17, § 7.10, at 674; *Campbell*, *supra* note 42, at 97-98.

⁸³ *PIERCE*, *supra* note 17, § 7.10, at 675; *Lavilla*, *supra* note 22, at 380-81.

⁸⁴ *See Lavilla*, *supra* note 22, at 381.

In *Mobil Oil Corp. v. Department of Energy*,⁸⁵ the Federal Energy Administration ("FEA") issued a regulatory change in oil price controls without notice and comment.⁸⁶ The new rule addressed an ambiguity in existing regulations that oil sellers were using to skirt the FEA's regulations.⁸⁷ The Temporary Emergency Court of Appeals held that the FEA had stated a good cause for promulgating the rule without normal procedures.⁸⁸ In support of its finding, the court reasoned that prior notice of the FEA's proposed rule would alert sellers to the existing ambiguity in the law, leading to market dislocation and the opposite result intended by the new rule.⁸⁹

In *DeRieux v. Five Smiths, Inc.*,⁹⁰ the Economic Stabilization Act of 1970 set a freeze on the price of season tickets to professional football games.⁹¹ The Temporary Emergency Court of Appeals held that the Executive Order implementing the price controls was exempt from notice and comment procedure under Section 553(b)(B)'s good cause exemption.⁹² The court noted that advance notice of the price freeze would have led to a massive rush to raise prices before the freeze deadline.⁹³ Such a result would lead to greater inflation, which was precisely the problem that the price controls were meant to address.⁹⁴

3. Congressional Intent

In some cases, congressional intent will determine whether an agency is permitted to dispense with notice and comment procedures in a particular case.⁹⁵ In such cases, the agency cannot afford to follow normal notice and comment procedures because Congress either explicitly or implicitly requires that the rule be promulgated immediately.⁹⁶

Where meeting an express statutory deadline for issuing a rule makes it impossible for an agency to simultaneously comply with notice and comment procedures, courts generally accept an agency's invocation of good cause.⁹⁷ Likewise, a statutory deadline coupled with some evidence of

⁸⁵ 728 F.2d 1477 (Temp. Emer. Ct. App. 1983).

⁸⁶ *Id.* at 1482.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1490.

⁸⁹ *Id.* at 1490-91.

⁹⁰ 499 F.2d 1321 (Temp. Emer. Ct. App. 1974).

⁹¹ *Id.* at 1326.

⁹² *Id.* at 1332.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Lavilla, *supra* note 22, at 353-54.

⁹⁶ PIERCE, *supra* note 17, § 7.10, at 676.

⁹⁷ *See* Lavilla, *supra* note 22, at 354.

congressional intent authorizing departure from APA procedures will also justify an agency's use of the good cause exception.⁹⁸

For instance, in *Asiana Airlines v. Federal Aviation Administration*,⁹⁹ the FAA promulgated an interim rule that allowed it to collect \$100 million in overflight fees, as authorized by the Federal Aviation Administration Reauthorization Act.¹⁰⁰ The interim rule was issued without notice and comment to meet an express statutory deadline, though the FAA did allow a post hoc opportunity to comment before issuing a final rule.¹⁰¹ The court held that the FAA properly relied on the good cause exception in issuing the interim rule.¹⁰² Although an express statutory deadline alone could not justify the use of the good cause exception, the court reasoned that the deadline, coupled with statutory language indicating that Congress intended for the FAA to waive APA procedure, was sufficient to uphold the rule.¹⁰³

Sometimes Congress does not establish a statutory deadline, but will otherwise reveal a desire for speedy implementation.¹⁰⁴ In such cases, courts must determine whether congressional intent to expedite an agency's issuance of a rule displaces its general policy favoring public participation. For example, in *Sepulveda v. Block*,¹⁰⁵ the Second Circuit held that the Secretary of Agriculture had good cause to forego notice and comment when he issued an interim regulation revising the food stamp statute.¹⁰⁶ In so concluding, the court noted that Congress set the date of the enactment of revisions as the same date on which the changes were to take effect.¹⁰⁷ The court also cited a Senate report that showed dissatisfaction with the slow implementation of provisions enacted the year before.¹⁰⁸

In contrast, in *Levesque v. Block*,¹⁰⁹ the First Circuit held that an interim rule promulgated without notice and comment was void even though there was reason to believe that Congress wanted the agency to act speedily.¹¹⁰ In *Block*, the Secretary of Agriculture issued an interim rule pursuant to the Omnibus Budget Reconciliation Act of 1981, which provided that the Secretary may implement the Act wholly according to his discretion, only taking into account the need for "orderly implementation."¹¹¹ The court held

⁹⁸ See *Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 398 (D.C. Cir. 1998).

⁹⁹ 134 F.3d 393 (D.C. Cir. 1998).

¹⁰⁰ *Id.* at 395.

¹⁰¹ *Id.*

¹⁰² *Id.* at 398-99.

¹⁰³ *Id.* at 398.

¹⁰⁴ See Lavilla, *supra* note 22, at 356-57.

¹⁰⁵ 782 F.2d 363 (2d Cir. 1986).

¹⁰⁶ *Id.* at 366.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 723 F.2d 175 (1st Cir. 1983).

¹¹⁰ *Id.* at 184.

¹¹¹ *Id.* (internal quotation marks omitted).

that Congress was particularly concerned for orderly, not immediate, implementation and that notice and comment procedure would neither be unnecessary nor contrary to the public interest in such a situation.¹¹²

As these cases show, courts will generally find an agency had good cause in issuing a rule without notice and comment only where congressional intent was unambiguous and a delay in promulgating the rule would be in conflict with a clear intention for speedy implementation.

B. *General Principles of Construction*

Both legislative intent and case law support the application of two general principles to the good cause exception: narrow construction and individualized circumstantial analysis.¹¹³

Many courts have read into the good cause exception a principle of narrow construction.¹¹⁴ Courts justify this principle based on congressional intent, as evidenced by various reports and statements issued in the APA's legislative history.¹¹⁵ Moreover, courts read the good cause exception in light of Congress's strong policy in favor of public participation in informal rulemaking, which encourages courts to avoid expanding the good cause exception beyond its limited scope.¹¹⁶

As a result of reading the good cause exception narrowly, some courts have rejected an agency's invocation of good cause when another feasible alternative is available to the agency.¹¹⁷ In other words, if it is feasible for an agency to both comply with notice and comment procedures and meet statutory deadlines, then courts will decline to uphold an agency's finding

¹¹² *Id.* at 184-85.

¹¹³ See Lavilla, *supra* note 22, at 333.

¹¹⁴ See, e.g., *United States v. Dean*, 604 F.3d 1275, 1279 (11th Cir. 2010) (indicating that the good cause exception should be read narrowly and only reluctantly countenanced); *United Techs. Corp. v. EPA*, 821 F.2d 714, 720 (D.C. Cir. 1987) (construing good cause exemption narrowly); *N.J. Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (adopting a narrow construction of the good cause exception).

¹¹⁵ See S. REP. NO. 79-248 § 4(a) cmt., reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944-46, at 358 (“[The exemption] is not an escape clause but one which, as the committee report explains, may be made operative only where facts and interests are such that notice and proceedings are impossible or manifestly unnecessary.”); *id.* § 4(a), at 200 (noting that the good cause exemption must be supported with a “true and supported or supportable finding of necessity or emergency”); see also *id.* (defining the standards used in Section 553(b)(B) narrowly).

¹¹⁶ See Lavilla, *supra* note 22, at 334.

¹¹⁷ See, e.g., *N.J. Dep't of Env't Prot.*, 626 F.2d at 1047 (refusing to uphold a rule that could simultaneously comply with both notice and comment requirements and statutory objectives).

of good cause.¹¹⁸ Conversely, the lack of a feasible alternative when issuing a rule will provide a basis for using the good cause exception.¹¹⁹

In addition to the principle of narrow construction, the existence of good cause depends upon the individual circumstances of each particular case.¹²⁰ The result is that a good cause exemption of a rule in one case cannot extend to exempt an entire category of rules automatically. Although some commentators have recommended the viability of this so-called “class exemption,”¹²¹ the strong public policy in favor of public participation and the need to read the good cause exception narrowly weighs in favor of examining each agency rule independently.

C. *Judicial Review of Good Cause Findings*

The agency bears the burden of persuasion in convincing the court that good cause, in fact, exists to exempt its rule from standard notice and comment procedure.¹²² In a majority of courts, the agency’s good cause finding is subject to a de novo standard of review, allowing courts to make an independent judgment as to whether good cause exists.¹²³ Some courts, however, will review an agency’s determination of good cause under the standard established by Section 706(2)(A) of the APA, rejecting a finding of good cause only if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹²⁴

¹¹⁸ *Tasty Baking Co. v. Cost of Living Council*, 529 F.2d 1005, 1015 (Temp. Emer. Ct. App. 1975).

¹¹⁹ *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984).

¹²⁰ *See, e.g., id.*

¹²¹ *See Arthur Earl Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 589-90 (1970).

¹²² *See, e.g., N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983) (noting that the Board has the burden of showing that good cause exists).

¹²³ *See, e.g., Mid-Tex Elec. Coop., Inc. v. Fed. Energy Regulatory Comm’n*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) (finding that an agency determination of good cause is subject to close judicial examination); *Mobil Oil Corp. v. Dep’t of Energy*, 728 F.2d 1477, 1486-87 (Temp. Emer. Ct. App. 1983) (advocating an independent determination of good cause); *Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 306 (9th Cir. 1980) (declaring judicial discretion to determine questions of law); *Mobil Oil Corp. v. Dep’t of Energy*, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979) (rejecting a rational basis argument for agency good cause findings).

¹²⁴ 5 U.S.C. § 706(2)(A) (2006); *see, e.g., Phila. Citizens in Action v. Schweiker*, 669 F.2d 877, 886 (3d Cir. 1982) (holding that the agency finding of impracticability was not arbitrary); *Ohio State Consumer Educ. Ass’n v. Schweiker*, 541 F. Supp. 915, 919 (S.D. Ohio 1982) (holding that the Secretary’s good cause findings were not arbitrary given the circumstances); *Coal. of Mich. Nursing Homes, Inc. v. Dempsey*, 537 F. Supp. 451, 459 (E.D. Mich. 1982) (upholding the Secretary of Health and Human Services’s actions as not arbitrary or capricious).

III. THE CIRCUIT SPLIT OVER THE RETROACTIVE APPLICATION OF SORNA PROVISIONS

A. *Background on SORNA*

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act (the “AWA” or “Act”).¹²⁵ Title I of the Act, known as the Sex Offender Registration and Notification Act, created a national system for the registration of sex offenders.¹²⁶ Prior to the AWA, existing federal laws such as the Jacob Wetterling Act and Megan’s Law compelled every state in the country to adopt registration laws for sex offenders.¹²⁷ However, Congress perceived a weakness in the current patchwork of state laws and enacted the AWA to establish a “comprehensive national system” for the registration of “sex offenders and offenders against children.”¹²⁸

The AWA contains an extensive array of new requirements for sex offender registration and community notification.¹²⁹ For example, SORNA specifies the categories of information that a sex offender must provide to the registry, including: name and aliases, Social Security number, residence, place of employment, and vehicle information.¹³⁰ The jurisdiction’s registry must also collect information related to the sex offender’s physical description and criminal history, as well as a current photograph, fingerprints and palm prints, a DNA sample, and a photocopy of a driver’s license or identification card.¹³¹ The Act requires every jurisdiction to maintain a sex offender registry that conforms to these and other requirements under SORNA, making the allocation of certain federal funds contingent on state compliance.¹³²

Most importantly, SORNA identifies when and how a sex offender should register under the Act and creates a new federal offense for failure to register as a sex offender.¹³³ Section 16913 of SORNA describes when a sex offender must register and under what conditions:

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For

¹²⁵ *United States v. Dean*, 604 F.3d 1275, 1276-77 (11th Cir. 2010).

¹²⁶ *United States v. Utesch*, 596 F.3d 302, 306 (6th Cir. 2010) (citing 42 U.S.C. § 16901 (2006)).

¹²⁷ Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 997-98 (2010).

¹²⁸ 42 U.S.C. § 16901; *see also* Logan, *supra* note 127, at 998-99.

¹²⁹ *See generally* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

¹³⁰ 42 U.S.C. § 16914(a).

¹³¹ *Id.* § 16914(b).

¹³² *Id.* § 16912(a).

¹³³ 18 U.S.C. § 2250 (2006); 42 U.S.C. § 16913.

initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.¹³⁴

Furthermore, the sex offender must keep his registration current after each change of name, residence, employment, or student status.¹³⁵ Section 16913 also provides the requirements for a sex offender registering for the first time.¹³⁶

To enforce these provisions, another section of SORNA provides for the conditions under which a sex offender is subject to criminal penalties for violating SORNA's registration requirements. Under 18 U.S.C. § 2250(a):

Whoever—(1) is required to register under [SORNA]; (2)(A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law . . . or (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and (3) knowingly fails to register or update a registration as required by [SORNA]; shall be fined under this title or imprisoned not more than 10 years, or both.¹³⁷

In other words, a sex offender who is required to register under SORNA but knowingly fails to do so is subject to federal criminal penalties if he travels in interstate commerce (i.e., across state borders) or is a sex offender under federal law.

SORNA has generated a significant amount of litigation, including challenges to the Act based on the nondelegation doctrine, the Ex Post Facto Clause, and the Commerce Clause.¹³⁸ Of concern to this Comment are challenges to regulations promulgated under SORNA that allegedly did not comply with the APA's notice and comment requirements. In particular, defendants have challenged a rule issued by the Attorney General, which makes SORNA's registration requirements apply retroactively to sex offenders convicted prior to SORNA's enactment.¹³⁹

Congress did not explicitly extend SORNA's requirements to sex offenders who were convicted prior to the enactment of SORNA, but dele-

¹³⁴ 42 U.S.C. § 16913(a).

¹³⁵ *Id.* § 16913(c).

¹³⁶ *Id.* § 16913(b).

¹³⁷ 18 U.S.C. § 2250(a).

¹³⁸ Tracy Bateman Farrell, Annotation, *Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA)*, 42 U.S.C.A. §§ 16901 *et seq.*, its Enforcement Provision, 18 U.S.C.A. § 2250, and Associated Regulations, 30 A.L.R. FED. 2d 213 § 2, at 223-24 (2008).

¹³⁹ See, e.g., *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010); *United States v. Utesch*, 596 F.3d 302, 309-10 (6th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 419-21 (6th Cir. 2009); *United States v. Gould*, 568 F.3d 459, 469 (4th Cir. 2009).

gated that determination to the Attorney General.¹⁴⁰ Specifically, SORNA provides that:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).¹⁴¹

On February 28, 2007, pursuant to Section 16913(d) of SORNA, Attorney General Alberto Gonzales did, in fact, promulgate an interim rule making SORNA retroactive to all sex offenders convicted prior to SORNA's enactment.¹⁴² The Attorney General issued this interim rule without notice and comment and without a thirty-day advance publication of its final form, invoking the good cause provisions of the APA.¹⁴³ However, the Attorney General stated that post-promulgation comments regarding the interim rule would be accepted until April 30, 2007.¹⁴⁴

On May 30, 2007, the Attorney General published proposed comprehensive guidelines for SORNA, known as "SMART" guidelines, named after the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking.¹⁴⁵ The guidelines reaffirmed the prior interim rule's retroactive application of SORNA to sex offenders whose conviction predated the enactment of the Act.¹⁴⁶ Unlike the interim rule, however, the SMART guidelines followed the APA's notice and comment procedures, accepting public comments until August 1, 2007.¹⁴⁷ Finally, on July 2, 2008,

¹⁴⁰ Some federal courts of appeal would disagree with this conclusion. The Eighth and Tenth Circuits have held that SORNA by its own terms applies to sex offenders prior to SORNA's enactment. *See* *United States v. Lawrance*, 548 F.3d 1329, 1336 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 916-19 (8th Cir. 2008). However, the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have held to the contrary, that the Act only applies retroactively to pre-SORNA sex offenders when the Attorney General prescribes so under his discretion. *See Utesch*, 596 F.3d at 309-10; *United States v. Juvenile Male*, 590 F.3d 924, 929 (9th Cir. 2010); *United States v. Young*, 585 F.3d 199, 201 (5th Cir. 2009); *United States v. Hatcher*, 560 F.3d 222, 228-29 (4th Cir. 2009); *United States v. Dixon*, 551 F.3d 578, 581-82 (7th Cir. 2008), *rev'd sub nom. Carr v. United States*, 130 S. Ct. 2229 (2010); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008). For the purposes of analyzing the Attorney General's use of the good cause exception in promulgating a rule under SORNA, this Comment assumes the conclusions of the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.

¹⁴¹ 42 U.S.C. § 16913(d).

¹⁴² 28 C.F.R. § 72.3 (2010); *see also Dean*, 604 F.3d at 1277.

¹⁴³ *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

¹⁴⁴ *See id.* at 8895.

¹⁴⁵ *The National Guidelines for Sex Offender Registration and Notification*, 72 Fed. Reg. 30,210 (May 30, 2007).

¹⁴⁶ *Id.* at 30,212.

¹⁴⁷ *Id.* at 30,210.

the Attorney General issued the final SMART guidelines, including the retroactivity provision in the final regulations.¹⁴⁸

B. *The Circuit Split on SORNA's Retroactive Application*

1. The Common Facts

Since the promulgation of the Attorney General's interim rule making SORNA's provisions retroactive to pre-SORNA sex offenders, a number of cases have arisen addressing the interim rule's validity under the APA.¹⁴⁹ In each of these cases, the defendant was an individual convicted of a sex offense prior to the enactment of SORNA on July 27, 2006.¹⁵⁰ The defendant was convicted in a state with a preexisting sex offender registry that required the defendant to register and maintain up-to-date information.¹⁵¹ Subsequently, each defendant also traveled in interstate commerce across state borders sometime after the date of SORNA's enactment, ending up in a state that also required sex offender registration, independently of SORNA.¹⁵² However, each defendant in these cases failed to register in that new state.¹⁵³ The defendant was ultimately arrested for this failure to register under SORNA, subsequent to the Attorney General's issuance of the interim rule in February 2007, but prior to the Attorney General's issuance of the finalized SMART guidelines in July 2008.¹⁵⁴

These defendants, in motions to dismiss their indictments, argued that the Attorney General's issuance of the interim rule making SORNA retroactive to pre-SORNA sex offenders did not conform to the requirements of the APA.¹⁵⁵ Specifically, the defendants argued that the Attorney General did not have good cause to exempt his rule from notice and comment pro-

¹⁴⁸ The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 (July 2, 2008).

¹⁴⁹ See *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010); *United States v. Utesch*, 596 F.3d 302, 309-10 (6th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 419-21 (6th Cir. 2009); *United States v. Gould*, 568 F.3d 459, 469 (4th Cir. 2009).

¹⁵⁰ See *Dean*, 604 F.3d at 1276; *Utesch*, 596 F.3d at 304; *Cain*, 583 F.3d at 410; *Gould*, 568 F.3d at 461.

¹⁵¹ See *Dean*, 604 F.3d at 1276; *Utesch*, 596 F.3d at 305; *Cain*, 583 F.3d at 411; *Gould*, 568 F.3d at 461.

¹⁵² See *Dean*, 604 F.3d at 1276; *Utesch*, 596 F.3d at 305; *Cain*, 583 F.3d at 411; *Gould*, 568 F.3d at 461.

¹⁵³ See *Dean*, 604 F.3d at 1276; *Utesch*, 596 F.3d at 305; *Cain*, 583 F.3d at 411; *Gould*, 568 F.3d at 461.

¹⁵⁴ See *Dean*, 604 F.3d at 1276; *Utesch*, 596 F.3d at 305; *Cain*, 583 F.3d at 410; *Gould*, 568 F.3d at 461.

¹⁵⁵ See, e.g., *Utesch*, 596 F.3d at 304.

cedures, and as a result, the interim rule that made SORNA's registration provisions retroactive to them was not valid.¹⁵⁶

The federal courts of appeal that have heard this issue have split over whether the Attorney General stated a valid good cause for issuing the interim rule regarding SORNA's retroactivity without notice and comment.

2. The Fourth and Eleventh Circuit Approach

Both the Fourth and Eleventh Circuits have upheld the Attorney General's use of the "good cause" provision to justify the interim rule's promulgation without notice and comment procedures or the thirty-day effective date delay under the APA.¹⁵⁷ In reaching their conclusion, both circuits rely heavily upon the Attorney General's own statement of good cause that he issued with the rule,¹⁵⁸ which claimed that it would be "contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d)."¹⁵⁹ To support this claim, the Attorney General offered the following reasons:

The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements—and related means of enforcement, including criminal liability under 18 U.S.C. 2250 for sex offenders who knowingly fail to register as required—to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of "protect[ing] the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders," SORNA § 102, because a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule.¹⁶⁰

Essentially, the Attorney General offered two reasons for good cause, both related to protecting the public interest. First, he asserted that immediate issuance of the rule was necessary to provide guidance and eliminate uncertainty as to the retroactive application of SORNA.¹⁶¹ Second, he

¹⁵⁶ See, e.g., *id.* at 308-09.

¹⁵⁷ *Dean*, 604 F.3d at 1282; *Gould*, 568 F.3d at 470.

¹⁵⁸ *Dean*, 604 F.3d at 1279-80; *Gould*, 568 F.3d at 469-70.

¹⁵⁹ Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

¹⁶⁰ *Id.* at 8896-97 (alteration in original).

¹⁶¹ *Id.* at 8896.

claimed that issuing the rule immediately would prevent delay in the registration of sex offenders, who could otherwise evade registration requirements during the notice and comment period, resulting in additional sexual assaults and greater difficulty in apprehending these sex offenders.¹⁶²

In regards to the first reason, the Fourth Circuit held that there was “a need for legal certainty” regarding the retroactive application to pre-SORNA sex offenders.¹⁶³ And the Eleventh Circuit noted that the Attorney General was granted sole authority by Congress to determine whether SORNA applied retroactively, and, in the absence of a rule, whether there was no guidance at all in place regarding the matter.¹⁶⁴ The Eleventh Circuit reasoned that providing guidance was particularly important for persons convicted of sex offenses prior to the Act because they needed to know whether to register.¹⁶⁵ Granting that the guidance rationale alone might not establish good cause, the Eleventh Circuit still gave some consideration to this factor.¹⁶⁶

Both the Fourth and the Eleventh Circuits found persuasive the Attorney General’s public safety justification to exempt the interim rule from APA notice and comment procedures.¹⁶⁷ The Fourth Circuit found that delaying the implementation of the interim rule in order to accept public comment “could reasonably be found to put the public safety at greater risk.”¹⁶⁸ Similarly, the Eleventh Circuit accepted the Attorney General’s claim that the retroactive application of SORNA would reduce the risk of additional sexual assaults and abuse by sex offenders by allowing federal authorities to immediately start prosecuting and apprehending sex offenders who failed to register with state registries.¹⁶⁹

In reaching its conclusion, the Eleventh Circuit noted that the good cause exception excused notice and comment not just in emergency situations, but also where “delay could result in serious harm.”¹⁷⁰ Thus, though the situation faced by the Attorney General did not constitute an emergency, the Eleventh Circuit reasoned that public safety would be improved by immediately promulgating the retroactivity rule, despite preexisting state and federal registration laws.¹⁷¹ SORNA, the Eleventh Circuit observed, would be implemented by federal law enforcement and would increase

¹⁶² *Id.* at 8896-97.

¹⁶³ *Gould*, 568 F.3d at 470.

¹⁶⁴ *United States v. Dean*, 604 F.3d 1275, 1280 (11th Cir. 2010).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1281; *Gould*, 568 F.3d at 470.

¹⁶⁸ *Gould*, 568 F.3d at 470.

¹⁶⁹ *Dean*, 604 F.3d at 1281.

¹⁷⁰ *Id.* (quoting *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)) (internal quotation marks omitted).

¹⁷¹ *Id.*

criminal sanctions for failure to register, leading to improved public safety.¹⁷²

The defendant in one case argued that good cause could not be justified based on harm caused by the rule's delay because Congress had already built in a period of delay by delegating SORNA's retroactivity application to the Attorney General, rather than resolving the issue itself.¹⁷³ The Eleventh Circuit rejected this argument, reasoning that all such delegations involve some delay as the agency brings its expertise to bear on the issue and that the true question was whether further delay caused by accommodating notice and comment would do real harm.¹⁷⁴ In the Eleventh Circuit's (as well as the Fourth Circuit's) determination, such a delay in implementing the interim rule would result in real harm.¹⁷⁵

3. The Sixth Circuit Approach

In contrast to the Fourth and Eleventh Circuits, the Sixth Circuit rejected the Attorney General's finding of good cause in issuing his interim rule without notice and comment.¹⁷⁶ First, the Sixth Circuit rejected the Attorney General's guidance rationale that foregoing APA notice and comment procedure was necessary to provide immediate guidance and avoid uncertainty about the retroactive application of SORNA.¹⁷⁷ Citing prior precedent for support, the Sixth Circuit reasoned that a "desire to provide immediate guidance, without more, does not suffice for good cause."¹⁷⁸ Otherwise, an agency would be able to invoke good cause for every rule promulgated, whether a real need existed or not.¹⁷⁹ Additionally, the Sixth Circuit observed that some element of uncertainty was already built into Congress's decision to delegate this regulatory authority to the Attorney General, as there was a necessary period of implementation while the Attorney General's expertise was brought to bear on the retroactivity issue.¹⁸⁰ Finally, the Sixth Circuit noted that the Attorney General himself caused a

¹⁷² *Id.*

¹⁷³ *Id.* at 1282.

¹⁷⁴ *Id.*

¹⁷⁵ *Dean*, 604 F.3d at 1282; *United States v. Gould*, 568 F.3d 459, 481 (4th Cir. 2009).

¹⁷⁶ *United States v. Utesch*, 596 F.3d 302, 309-10 (6th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 422-23 (6th Cir. 2009).

¹⁷⁷ *Cain*, 583 F.3d at 421; *see* *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8896-97 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

¹⁷⁸ *Cain*, 583 F.3d at 421 (quoting *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979)) (internal quotation marks omitted).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

seven-month delay in issuing the interim rule, which was also responsible for some period of uncertainty.¹⁸¹

The Sixth Circuit also assessed whether there was congressional intent weighing in favor of dispensing with notice and comment in this situation.¹⁸² It noted that when Congress chose to delegate regulatory authority to the Attorney General regarding SORNA's retroactivity, Congress itself created a period of delay long enough for the Attorney General to promulgate a rule according to APA procedures.¹⁸³ Furthermore, Congress declined to bypass the APA's requirements either explicitly or by setting a statutory deadline.¹⁸⁴ These facts suggested that "Congress had thus already balanced the costs and benefits of an immediately effective rule compared to the delayed implementation of a reasoned regulation."¹⁸⁵

Additionally, the Sixth Circuit addressed the Attorney General's argument that the rule required immediate implementation in order to prevent harm to public safety.¹⁸⁶ It observed that there was an important distinction between this rule and other agency rules that warranted a good cause exception to prevent harm to public safety.¹⁸⁷ In prior cases, the rule was addressing a harmful situation that first arose *after* Congress had already passed the statute at issue, not a preexisting situation like the one here.¹⁸⁸ In such cases, once the congressional statute had been enacted, an emergency occurred that the statute could not address, and therefore, an agency was justified in issuing a rule immediately.¹⁸⁹ Here, the potential harms to public safety (e.g., additional sexual assaults and child abuse offenses as a result of the uncertain applicability of federal registration requirements to pre-SORNA sex offenders) preexisted the enactment of SORNA, and because Congress could have addressed them itself, but chose not to, there was no contingent event that justified the Attorney General's use of the good cause exception.¹⁹⁰

Furthermore, in prior cases that upheld good cause findings on the basis of some threat to public safety, the agency was able to produce specific evidence or reasons, like an accident record, to argue that its existing regulations were insufficient to protect public safety.¹⁹¹ Here, the Sixth Circuit noted that the Attorney General provided no specific evidence to support

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Cain*, 583 F.3d at 421.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 422.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (citing *Haw. Helicopter Operators Ass'n v. Fed. Aviation Admin.*, 51 F.3d 212, 214 (9th Cir. 1995)).

¹⁸⁹ *Id.* (citing *Helicopter Operators*, 51 F.3d at 214).

¹⁹⁰ *See Cain*, 583 F.3d at 422.

¹⁹¹ *See id.* (citing *Helicopter Operators*, 51 F.3d at 214).

his conclusion that the public safety was in danger without the issuance of an immediate retroactivity rule.¹⁹²

Finally, the Sixth Circuit reasoned that proper statutory protections are even more essential for regulations like the Attorney General's retroactivity rule that increase criminal sanctions.¹⁹³ It observed that providing notice is particularly important in the criminal law, and the Attorney General's rule would make sex offenders suddenly subject to much harsher federal penalties without warning.¹⁹⁴ For the Sixth Circuit, these circumstances made the need for notice and comment procedures all the more compelling.

4. Assessing the Competing Approaches

In assessing the competing approaches to the retroactivity rule issued by the Attorney General, it is helpful to place this controversy into the context of case law covering the good cause exception and the general principles of construction sketched out previously. First, it is necessary to identify whether the Attorney General's interim rule falls within one of the categories that courts identify as warranting a good cause finding. Second, it must be determined which of the circuit courts better exemplifies the general principles of construction that courts have adopted when applying the good cause exception. Such an analysis will help expose potential weaknesses in good cause exemption analysis and suggest which reforms, if any, may be beneficial.

All three circuit courts generally analyze the validity of the Attorney General's interim rule under the "immediate threat to public health, safety, or welfare" rubric.¹⁹⁵ The Attorney General's primary argument for dispensing with notice and comment centers on the potential harm to public safety that might result from a delay in issuing the retroactivity rule.¹⁹⁶ Under this rubric, the Fourth and Eleventh Circuits fail to make a convincing case that an emergency situation exists sufficient to forego notice and comment procedures.

First, the approach of the Fourth and Eleventh Circuits makes several errors in basic logic. While the Eleventh Circuit suggests that an emergency

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 423 ("When the consequence of agency rule making is to make previously lawful conduct unlawful and to impose criminal sanctions, the balance of these competing policies imposes a heavy burden upon the agency to show public necessity." (quoting *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977)) (internal quotation marks omitted)).

¹⁹⁵ See *United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010); *United States v. Utesch*, 596 F.3d 302, 309 (6th Cir. 2010); *Cain*, 583 F.3d at 420-22; *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009).

¹⁹⁶ See *Dean*, 604 F.3d at 1281; *Utesch*, 596 F.3d at 309; *Cain*, 583 F.3d at 420-21; *Gould*, 568 F.3d at 469-70.

is not necessary to a finding of good cause under this rubric, it claims that the alternative is a situation where “delay could result in serious harm.”¹⁹⁷ However, the distinction between an emergency and a situation where delay could cause serious harm is not clearly evident. In fact, it is quite possible to define an emergency as a situation where “delay could cause serious harm.” If so, the distinction is negligible at best.

Even if there is a distinction, both the Fourth and the Eleventh Circuits fail to demonstrate that the Attorney General in fact faced a situation where delay could cause serious harm. The Eleventh Circuit makes the mistake in arguing that because the interim rule would “improve public safety,”¹⁹⁸ an immediate lack thereof would do real harm. Under this rubric, the standard for justifying a finding of good cause does not depend on whether the agency’s regulation would *improve* public safety, but whether the lack thereof would pose a serious and immediate *threat to* public safety. Thus, the Eleventh Circuit makes the wrong argument, while the Fourth Circuit fails to make any argument, merely asserting without support that a delay in implementing the retroactivity rule could “be found to put the public safety at greater risk.”¹⁹⁹

Furthermore, the Fourth and Eleventh Circuits merely accept the Attorney General’s bald conclusions that a delay in implementing the interim rule could result in additional sexual assaults and greater difficulty in apprehending these sex offenders. While plausible, mere plausibility has never been the standard by which courts determine if a real threat to the public welfare exists to justify use of the good cause exception.²⁰⁰ As the Sixth Circuit correctly recognizes, more is needed than mere assertions of danger to public safety; specific evidence is necessary.²⁰¹ The Fourth and Eleventh Circuits neglect to review the Attorney General’s assertions with the proper level of scrutiny that is required when an agency dispenses with the APA’s notice and comment procedures in issuing a legislative rule.²⁰²

The Sixth Circuit develops a better argument in concluding that the Attorney General lacked good cause in issuing its interim rule without notice and comment. The observation that courts have generally upheld good cause where emergency situations arose *after* the enactment of the statute in question is relevant here. In fact, it is difficult to think of any situation existing prior to the enactment of a statute that would constitute an emergency requiring the need for an agency rule exempt for good cause. If there was

¹⁹⁷ *Dean*, 604 F.3d at 1281 (quoting *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)) (internal quotation marks omitted).

¹⁹⁸ *Id.*

¹⁹⁹ *Gould*, 568 F.3d at 470.

²⁰⁰ *See, e.g., Haw. Helicopter Operators Ass’n v. Fed. Aviation Admin.*, 51 F.3d 212, 214 (9th Cir. 1995); *Tex. Food Indus. Ass’n v. U.S. Dep’t of Agric.*, 842 F. Supp. 254, 260 (W.D. Tex. 1993).

²⁰¹ *Cain*, 583 F.3d at 422 (citing *Helicopter Operators*, 51 F.3d at 214).

²⁰² As discussed earlier in this Comment, a majority of courts subject an agency’s good cause finding to a de novo standard of review. *See supra* Part II.C.

such a situation, then Congress would naturally have addressed it in the statute, or would have expressly allowed the agency to bypass notice and comment procedures. As a result, the general rule that good cause only exempts an agency rule from notice and comment if a contingent emergency arises subsequent to the congressional statute is sound.

The Sixth Circuit also does a better job in balancing the competing interests of immediate rulemaking and public participation. The Sixth Circuit properly recognizes that an agency rule that increases criminal penalties should require greater justification when dispensing with notice and comment procedures. The general principle of narrow construction also favors the Sixth Circuit approach, as it recognizes the strong public policy favoring public participation in informal rulemaking. Unless the agency has a compelling interest, demonstrable through concrete evidence, that clearly outweighs the need for public participation, courts should require the agency to comply with APA notice and comment procedures.

IV. RECOMMENDATIONS

The good cause exception requires both reform and better guidelines in order to arrive at more consistent results and avoid the circuit splits that result in legal uncertainty. This Comment recommends a multi-faceted approach for improving good cause jurisprudence and practice in the future: (1) the language of the APA's good cause exception should be amended; (2) agencies should be required to publish a formal statement of reasons in good cause findings; (3) agencies should be obliged to invite posteffective opportunity for comment for interim rules issued under the good cause exception; and (4) courts should review agency good cause findings under a *de novo* standard of review.

A. *Amending the Language of Section 553(b)(B)*

Congress should reconsider some of the prior congressional proposals that were made to amend the language of the APA's good cause exception in Section 553(b)(B). As it stands now, the statutory language that exempts notice and comment when "impracticable, unnecessary, or contrary to the public interest"²⁰³ is much too vague and provides too little guidance for both agencies and courts.²⁰⁴ In fact, the language leaves agencies and courts

²⁰³ 5 U.S.C. § 553(b)(B) (2006).

²⁰⁴ See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1123 (2009) ("The APA's text is largely vacuous . . . 'good cause' is an open-ended standard that essentially delegates the issue to future decisions of agencies and judges.").

too much discretion to expand the good cause exception to reach situations that may never have been intended by Congress.

While some scholars contend that this sort of discretion is an important component of an agency's ability to respond to emergencies that cannot be anticipated in advance,²⁰⁵ it does not follow that this discretion should be left entirely unbounded. On the contrary, the rule of law should provide important constraints on such discretion, especially in the time of emergency. Professor David Dyzenhaus argues that "the constraints of legality are the constraints of adequate justification," such that public officials must provide meaningful public justification for their actions during emergencies.²⁰⁶ Public justification serves to bolster an agency's public legitimacy while protecting individuals from arbitrary action by the state.²⁰⁷

Notice and comment rulemaking is one such vehicle available for agencies to articulate and justify their policy choices to the public. Where such procedural requirements prove too burdensome, however, agencies are often tempted to abandon them entirely using procedural exceptions that are at their disposal, such as Section 553(b)(B)'s good cause exception.²⁰⁸ These procedural exceptions consist of what one scholar calls "black holes," that is, zones where federal agencies are free to operate outside the rule of law.²⁰⁹

In order to patch up these so-called black holes, federal agencies must satisfy the rule of law by justifying their actions to the public and to courts, especially in times of emergency when the risk of arbitrary state action is at its greatest.²¹⁰ This would entail legal standards flexible enough for agencies to respond to unforeseen contingencies, but precise enough to allow for reasonable public justification for agency actions and meaningful judicial review.

Amendments to the language of Section 553(b)(B)'s good cause exception, then, should have the primary purpose of making the statute less vague and providing more guidance to federal agencies and courts regarding which circumstances truly justify forgoing notice and comment proce-

²⁰⁵ See generally *id.*

²⁰⁶ David Dyzenhaus, *Law as Justification: Etienne Mureinik's Conception of Legal Culture*, 14 S. AFR. J. HUM. RTS. 11, 30 (1998).

²⁰⁷ See Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271, 1276 (2010).

²⁰⁸ See Vermeule, *supra* note 204, at 1123.

²⁰⁹ *Id.* at 1096 (internal quotation marks omitted). Professor Vermeule argues that the APA is designed to allow federal agencies to operate outside the normal rule of law in times of emergency, creating procedural exceptions, or "black holes." *Id.* (internal quotation marks omitted). According to Vermeule, such black holes are an institutional inevitability, and any proposals to extend the rule of law to administrative action during times of emergency are regarded as "hopeless fantasy." *Id.* at 1105.

²¹⁰ See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 62 (2006); Criddle, *supra* note 207, at 1278 ("[A]rbitrary state action in emergencies undermines the fiduciary character of state legal authority.").

dures. To this end, the new language should clarify and reflect the three situations in which good cause has commonly been recognized: (1) where there is a serious and immediate threat to the public health, safety, or welfare; (2) where prior notice of a proposed rule causes harm and frustrates the purpose of the rule; and (3) where Congress has explicitly or implicitly exempted a specific rule from informal rulemaking procedure.²¹¹

The first category of cases is aptly captured in language proposed by the ABA in 1963 to amend Section 553(b)(B).²¹² The ABA proposed that notice and comment procedures be dispensed with when “immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare.”²¹³ This language would adequately encompass the first category of cases where good cause is justified in an emergency situation posing an immediate threat to the public health, safety, or welfare. This language would also replace the currently broad and vague standards that allow a good cause exception when notice and comment procedure would simply be “impracticable” or “contrary to the public interest.” This new standard, by contrast, requires the agency to justify its use of the good cause exception only when it is “imperatively necessary” for the immediate adoption of a rule.

The second category of cases, where prior notice of a proposed rule frustrates its purpose, can be sufficiently captured in language previously recommended to Congress in 1967 to amend the good cause exception. This would allow the good cause exception to operate where “notice of proposed rulemaking would seriously impair the effectiveness of the rule.”²¹⁴ This standard encompasses the paradigmatic economic regulation, such as one that seeks to remove (or institute) a price ceiling, which would lose all effectiveness if the public were to have prior notice of the regulation first. Again, the language here is considerably more precise than the old “impracticable” standard, which leaves too much discretion to agencies and courts to define its meaning. At the same time, the language is not so precise as to operate as a bright-line rule, which would unreasonably constrain agencies from taking appropriate action when necessary.

Finally, the good cause exception should include explicit language that would cover the third category of cases involving congressional intent to exempt specific rules from APA notice and comment procedures. A bill that was introduced in the House of Representatives proposed a modification of the good cause exception that would exempt a rule from notice and com-

²¹¹ See *supra* Part II.A.

²¹² See Lavilla, *supra* note 22, at 324 n.30 (citing S. 2335, 88th Cong. § 1003(d) (1963), and S. 1070, 86th Cong. § 1003(d) (1959)).

²¹³ See *id.* (quoting S. 2335, 88th Cong. § 1003(d), and S. 1070, 86th Cong. § 1003(d)) (internal quotation marks omitted).

²¹⁴ See *id.* at 325 n.31 (quoting S. 2771, 90th Cong. § 553(n)(4) (1967)) (internal quotation marks omitted).

ment when delay would “substantially frustrate legislative policies.”²¹⁵ This language would accurately capture the situations where Congress either explicitly or implicitly intended for a particular agency rule to be exempt from APA procedures. This category compensates for the glaring absence of such a standard in Section 553(b)(B)’s current formulation. When Congress deems it necessary to override its usual preference for public participation in informal rulemaking, courts should allow agencies to relax their strict compliance with notice and comment procedures in order to meet other congressional expectations, such as speedy implementation.

Incorporating all these changes, the new Section 553(b)(B) would read as follows: an agency may dispense with notice and comment procedures in informal rulemaking

when the agency for good cause finds . . . that (a) *immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare*; (b) *notice of proposed rulemaking would seriously impair the effectiveness of the rule*; or (c) *delay in implementing the rule would substantially frustrate legislative policies*.

By clarifying the previous language of the statute, agencies will have more concrete grounds for justifying dispensing with notice and comment requirements, while courts will have greater guidance in applying the good cause exception in only narrow situations. Ultimately, Congress’s strong policy in favor of public participation for agency rulemaking will be maintained in all but a few limited cases.

B. *Mandatory Statement of Reasons*

If we accept that the rule of law applies to public officials even in times of emergency and that the rule of the law is essentially a “rule of reasons,”²¹⁶ then public officials should be expected to give reasons for their actions during emergencies, and these reasons should conform to the existing legal order.²¹⁷ Applied to federal agencies seeking to invoke good cause to dispense with notice and comment requirements, agencies should be required to furnish reasons establishing the existence of a good cause for issuing a rule without standard APA procedures. In other words, a formal statement of reasons incorporating the agency’s good cause findings should be an essential prerequisite for the validity of a rule issued under Section 553(b)(B).

²¹⁵ See *id.* at 326 (quoting H.R. 1776, 98th Cong. (1983)) (internal quotation marks omitted).

²¹⁶ See Criddle, *supra* note 207, at 1276 (characterizing “Dyzenhaus’s conception of the rule of law as a rule of reasons”); Dyzenhaus, *supra* note 206, at 30 (“[T]he constraints of legality are the constraints of adequate justification.”).

²¹⁷ See Criddle, *supra* note 207, at 1276.

Requiring a mandatory statement of reasons for rules issued under the good cause exception is also rooted in the fiduciary character of public administrative agencies. Public agencies and officials are entrusted with significant powers and responsibilities by law and, therefore, stand in a trust-like relationship with members of the public, who are “vulnerable to the abuse of administrative power.”²¹⁸ As a result, these public officials owe a fiduciary duty to discharge their obligations fairly and reasonably to the public, and should provide reasons justifying their actions if necessary. As Professor Evan Criddle puts it:

Just as the common law places trustees and other fiduciaries under legal obligations to honor their beneficiaries’ legitimate interests, those who wield powers of public administration likewise bear fiduciary obligations to treat their subjects fairly, reasonably, and non-arbitrarily for public-regarding purposes. Where feasible, public administrators must also engage in deliberative decisionmaking, and they must be ready to provide reasons for their actions that are consistent with their fiduciary role.²¹⁹

Since furnishing reasons is essential to the fiduciary obligations of administrative agencies, requiring them to provide a statement of reasons along with their finding of good cause is reasonable. In addition, the requirement serves three important purposes. First, agencies will avoid capricious use of the good cause exception because a statement of reasons requires them to provide justification for invoking the exception.²²⁰ Second, providing a statement of reasons will facilitate the exercise of judicial review.²²¹ Finally, making the statement of reasons a mandatory feature of Section 553(b)(B) is consistent with the structure of the APA, which currently does not reference a statement of reasons for any other exception besides the good cause exception.²²²

C. *Mandatory Invitation for Posteffective Comments*

An agency that chooses to go down the “good cause” route and dispense with prior notice and comment procedures will also often issue the rule with an opportunity for posteffective comment, issuing a final rule later in light of those comments.²²³ Rules that become effective without prior

²¹⁸ *Id.* at 1277. See generally Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010).

²¹⁹ See Criddle, *supra* note 207, at 1277 (footnote omitted).

²²⁰ See *Levesque v. Block*, 723 F.2d 175, 180 (1st Cir. 1983).

²²¹ See *Kelly v. Dep’t of Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972) (regarding the failure to include a statement of reasons as fatal because the court has nothing by which to measure the propriety of the rule).

²²² Cf. 5 U.S.C. § 553(d) (2006) (lacking a requirement for a statement of reasons).

²²³ See Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999).

notice and public comment but invite posteffective public comments are known as interim-final rules,²²⁴ and the use of such rules has become fairly commonplace among agencies today.²²⁵ The use of interim-final rules provides at least some of the benefits of public participation in rulemaking while also capturing some, but not all, of the cost and time savings of adopting a rule without any opportunity for public comment.²²⁶ In the SORNA cases, the Attorney General adopted such a rule, making SORNA's provisions retroactive to pre-SORNA sex offenders and inviting posteffective public comment *after* the rule had already been issued without notice and comment.²²⁷

This Comment recommends that the use of posteffective comment procedures should be mandatory for all legislative rules adopted without prior notice and comment under the good cause exception. The need for public participation neither diminishes, nor disappears merely because an agency has a perceived need for immediate implementation of a rule. Rather, the need to respond quickly to exigent circumstances may sometimes outweigh the costs and delay imposed by requiring prior notice and public comment for legislative rules. However, this does not mean that posteffective comments also become unnecessary by virtue of a good cause finding. If anything, the purposes provided by the notice and comment procedure—producing higher quality rules, ensuring the fair treatment of persons affected by the rule, and legitimizing the process²²⁸—are just as important for emergency rules as for rules issued when no emergency exists.

The presence of an emergency situation suggests that there is a compelling problem that needs immediate redress. As a result, many of the rules issued under Section 553(b)(B)'s good cause exception are quite important for both the agency issuing the rule and the parties affected by the rule. Given the chance, many of the affected parties are likely to take advantage of the opportunity to comment and affect the final rule, even if the opportunity only arises after the interim-final rule becomes effective.²²⁹ Such an opportunity to provide input is especially important where the regulation increases criminal penalties and individual liberty is at stake, as was the case when the Attorney General issued a regulation making SORNA's pro-

²²⁴ *Id.* at 705 (noting that numerous other labels for such rules are common, such as “interim,” “temporary” rules or “final rules; comments requested” (internal quotation marks omitted)).

²²⁵ *Id.* at 714-15 (finding that from 1989 to 1997, the use of interim-final rules seemed to be holding steady or increasing, while the number of final rules adopted with opportunity to comment had decreased sharply).

²²⁶ *Id.* at 710 (observing that interim-final rules “strike a compromise between a perceived need for immediate adoption of a rule and the values of public participation and regulatory analysis”).

²²⁷ *See* Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

²²⁸ *See supra* Part I.A.

²²⁹ *See Asimow, supra* note 223, at 734.

visions applicable to pre-SORNA sex offenders, subjecting them to harsher federal criminal sanctions for failure to register.²³⁰

Thus, making posteffective opportunity for comment mandatory where the rule has been adopted without notice and comment under the good cause exception strikes an acceptable compromise between the competing interests of speedy implementation and public participation. The requirement would also serve the agency's desire to produce rules that are as wise, efficient, and widely accepted as possible, while also consistent with its fiduciary obligations to members of the public.

There is one caveat—the use of interim-final procedures does not alone justify an agency's use of the good cause exception. An agency rule that neglects to follow prior notice and comment procedures under the APA cannot cure this defect by accepting posteffective comments from the public and later republishing a finalized rule incorporating those comments.²³¹ Requiring the mandatory use of interim-final rules for all agency rules adopted under the good cause exception will not change the inquiry courts make to decide if dispensing with prior notice and comment was truly warranted for good cause in the first place.

On the other hand, some courts have found that the use of such interim-final rules weighed in favor of the agency's claim that the rule was justified under the good cause exception, if not proving to be a dispositive factor in their analysis.²³² As a result, influencing courts to accept their good cause findings was at least one incentive for agencies to use interim-final procedures.²³³

Making the use of interim-final rules mandatory, however, is likely to vitiate any effect that a voluntary use of a posteffective comment period might have had on the court's review of a rule's validity under the good cause exception. An agency that uses interim-final rules cannot demonstrate its ready willingness to consider posteffective public comments if the use of

²³⁰ See 18 U.S.C. § 2250(a) (2006).

²³¹ See, e.g., *United States v. Utesch*, 596 F.3d 302, 312 (6th Cir. 2010) (finding that process was “fatally flawed” despite the opportunity for posteffective comment because “affected parties had no opportunity to participate in the crafting of the interim rule *before* it purported to take effect against them”).

²³² See *Mid-Tex Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987) (treating the use of post-adoption comments in favor of the agency); *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984) (holding posteffective comments demonstrate the open-mindedness of the agency); *Republic Steel Corp. v. Costle*, 621 F.2d 797, 804 (6th Cir. 1980) (finding that the EPA seriously considered industry comments); *Coal. of Mich. Nursing Homes, Inc. v. Dempsey*, 537 F. Supp. 451, 459 (E.D. Mich. 1982) (upholding an interim rule because a posteffective comment period was allowed). *But see, e.g., Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419, 425-26 (3d Cir. 1982) (holding that advance notice of interim-final rulemaking did not suffice for good cause); *Phila. Citizens in Action v. Schweiker*, 669 F.2d 877, 885 n.9 (3d Cir. 1982) (concluding that the use of an interim-final rule would not have established good cause); *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980) (disregarding the opportunity for posteffective comment period).

²³³ Asimow, *supra* note 223, at 723.

such rules is mandatory and not a voluntary measure by the agency.²³⁴ This is not an undesirable result, though, as inviting posteffective comments from the public can never be a complete substitute for the procedural requirements of prior notice and comment. As a result, courts should not be unduly influenced by an agency's willingness to accept posteffective comments since it does not cure the main problem that affected parties did not have an opportunity to influence the rule *before* it took effect.

D. *De Novo Standard of Review*

Finally, the appropriate standard of review for an agency's good cause findings should be *de novo*, which is the approach taken by a majority of courts.²³⁵ This conclusion is also supported by the APA's legislative history, which requires that a case of "necessity or emergency must be made" in order for an agency's good cause finding to stand.²³⁶ Furthermore, the APA's legislative history also states that in the end the propriety of good cause findings "in law and fact must be sustainable upon inquiry by a reviewing court."²³⁷ To allow otherwise would accord too much deference to an agency's good cause determination, leading to the treatment of the good cause exception as an "escape clause" for agencies wishing to avoid the notice and comment requirements out of mere convenience.

V. APPLYING THE RECOMMENDATIONS TO TEST CASES

A. *Test Suite: The Circuit Split on SORNA's Retroactive Application*

The proposals made here to clarify and constrain use of the good cause exception would, if implemented, provide considerably more guidance to agencies and courts seeking to determine when a legislative rule is truly exempt from notice and comment for good cause. The recent circuit split on the validity of the Attorney General's interim rule making SORNA retroactive to pre-SORNA sex offenders is a good occasion to test the proposals in action.

²³⁴ Cf. *Petry*, 737 F.2d at 1203 (holding that posteffective comments demonstrate the open-mindedness of the agency).

²³⁵ See *supra* Part II.C.

²³⁶ See Lavilla, *supra* note 22, at 334 (quoting S. DOC. NO. 79-248 (1946), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944-46, at 200, 258) (internal quotation marks omitted).

²³⁷ *Id.* at 398 n.327 (quoting S. DOC. NO. 79-248 (1946), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944-46, at 217, 278-79) (internal quotation marks omitted).

From the outset, courts lack uniformity regarding an important guideline in their analysis: the appropriate standard under which to review the agency's determination of good cause. The Eleventh Circuit adopted an arbitrary and capricious standard²³⁸ and the Sixth Circuit reviewed the agency's good cause finding de novo,²³⁹ while the Fourth Circuit made no mention of the standard of review it used in its opinion.²⁴⁰ For the reasons stated in this Comment, the Sixth Circuit's approach is the correct one, and therefore, the Attorney General's interim rule should have been reviewed de novo, permitting the court to use its own independent judgment as to whether good cause truly existed.²⁴¹

Mandatory use of a statement of reasons incorporating an agency's good cause findings would be satisfied, as the Attorney General did include a statement of reasons supporting his good cause claim along with the publication of the interim rule.²⁴² The Attorney General would also satisfy the new requirement making interim-final rules obligatory under the good cause exception, since his interim rule was published with an explicit invitation for post-promulgation comments until a certain date.²⁴³ These two new requirements—mandatory use of a statement of reasons and interim-final rules—would have a substantial effect in weeding out invalid agency rules in many cases, but are not as relevant here.

On the other hand, the new language of Section 553(b)(B) proposed in this Comment would have the immediate effect of providing badly needed guidance for a court reviewing the validity of the Attorney General's rule. Rather than have courts fumble around trying to discern the content of a broad and ambiguous standard such as “impracticable,” or distinguish between “emergencies” and situations where “delay could result in serious harm,”²⁴⁴ the language proposed here would define three, relatively concrete situations in which the good cause exception would apply. At the same time, the new standards do not unreasonably limit the agency's discretion to respond to truly contingent circumstances.

As a result, it is clear that under the new language the Attorney General's interim rule would not be justified under either subsections (b) or (c) of the newly proposed Section 553(b)(B).²⁴⁵ Rather, only subsection (a) of the

²³⁸ *United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010).

²³⁹ *United States v. Utesch*, 596 F.3d 302, 306 (6th Cir. 2010).

²⁴⁰ *See generally United States v. Gould*, 568 F.3d 459 (4th Cir. 2009).

²⁴¹ *See supra* Part IV.D.

²⁴² *See Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8896-97 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

²⁴³ *See id.* at 8895.

²⁴⁴ *See United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010) (quoting *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)) (internal quotation marks omitted).

²⁴⁵ Delay in implementing the Attorney General's interim rule does not substantially frustrate legislative policies under subsection (c), as there was no explicit or implicit congressional intent to override the APA's notice and comment requirements. *See United States v. Cain*, 583 F.3d 408, 421 (6th

reformulated good cause exception supplies a possible justification for the Attorney General's interim rule.²⁴⁶ It provides that an agency may dispense with notice and comment procedures when it for good cause finds that "immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare."²⁴⁷

However, the Attorney General would be unlikely to prevail under this reformulated standard. The touchstone for this new standard is "imperative necessity," which closely tracks Congress's desire to provide a good cause exception only in cases of true emergency.²⁴⁸ The Attorney General's interim rule fails to demonstrate imperative necessity for a number of reasons already described in the Sixth Circuit's opinion: (1) the Attorney General failed to provide specific evidence of danger to public safety; (2) the harmful situation preexisted the enactment of SORNA, implying that Congress could have addressed the situation itself if it so desired; and (3) state and federal laws already exist adequate to respond to the situation.²⁴⁹ Moreover, even the Eleventh Circuit admitted that the situation the Attorney General faced—that is, the registration of pre-SORNA sex offenders who were already subject to registration requirements of their respective states—did not qualify as a true emergency.²⁵⁰

B. *The Folly of the "Totality of the Circumstances" Approach*

Courts evaluating an agency's good cause determination will often fall back upon the "totality of the circumstances" in finding that the agency justifiably invoked the good cause exception to notice and comment procedure.²⁵¹ Such an approach, however, invites courts to substitute their own ideas for what constitutes "good cause," rather than relying on the language of the actual statutory exception or on prior precedents. One particular case, dealing with a Food Nutrition Service ("FNS") interim regulation implementing provisions of the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), is a good example of this tendency

Cir. 2009) (noting that Congress itself created a period of delay long enough for the Attorney General to issue a rule pursuant to APA procedures). Also, notice of the Attorney General's interim rule would not seriously impair the effectiveness of his rule under subsection (b), as providing notice to the pre-SORNA sex offenders was one of the goals of the interim rule under the Attorney General's guidance rationale. *See Gould*, 568 F.3d at 470 (holding that the "need for legal certainty" weighed in favor of the interim rule's validity).

²⁴⁶ *See supra* Part IV.A.

²⁴⁷ *See supra* notes 212-13 and accompanying text.

²⁴⁸ *See Jordan*, *supra* note 10, at 118-19; *Campbell*, *supra* note 42, at 96.

²⁴⁹ *See Cain*, 583 F.3d at 421-23.

²⁵⁰ *See United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010).

²⁵¹ *See Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984); *Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 104 (D.D.C. 2006).

and provides further support for this Comment's proposal to clarify the language of the good cause exception.

WIC is a federal grant-in-aid program that provides supplemental foods and nutrition education to certain categories of women, infants, and children who are at nutritional risk.²⁵² WIC participants receive vouchers to use at authorized retail food vendors, who in turn submit the vouchers to their state agencies for reimbursement.²⁵³ In addition to neighborhood supermarkets and big-box stores like Wal-Mart, in some states authorized vendors also include WIC-only vendors, who focus only on meeting the needs of WIC participants.²⁵⁴ By the early part of the 2000s, these WIC-only vendors grew to become a problem, as they were outside the competitive food market and tended to charge much higher prices for WIC food items than regular grocery stores, resulting in significantly greater costs to the federal government.²⁵⁵

On June 30, 2004, Congress responded to the problem of WIC-only vendors by passing a WIC Reauthorization Act that imposed certain cost-containment measures on state agencies.²⁵⁶ Congress also established certain important deadlines for the implementation of the cost-containment measures, providing that (1) states must comply with the cost-containment measures by December 30, 2005; (2) the Secretary of Agriculture must issue guidance to state agencies "as soon as practicable"; (3) the Secretary must promulgate a final regulation by June 30, 2006; and (4) the Secretary may promulgate interim-final regulations to implement the cost-containment measures.²⁵⁷

The FNS published an interim rule on November 29, 2005; the rule became effective on December 29, 2005, a day before states were required to implement the cost-containment measures.²⁵⁸ In the notice for its interim rule, the FNS determined that prior notice and comment would be "unnecessary" because Congress required guidance to be issued as soon as practicable, while also authorizing the issuance of interim-final regulations.²⁵⁹ When the interim rule was later challenged in *National Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Service*²⁶⁰ for violating the APA's notice and comment procedures, the district court found the reasons

²⁵² *Nat'l Women*, 416 F. Supp. 2d at 95.

²⁵³ *Id.*

²⁵⁴ *Id.* at 95-96.

²⁵⁵ *Id.* at 96.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 96-97 (quoting 42 U.S.C. § 1758 (2006)) (internal quotation marks omitted).

²⁵⁸ *Nat'l Women*, 416 F. Supp. 2d at 97.

²⁵⁹ Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Vendor Cost Containment, 70 Fed. Reg. 71,708, 71,712 (Nov. 29, 2005) (to be codified at 7 C.F.R. pt. 246).

²⁶⁰ 416 F. Supp. 2d 92 (D.D.C. 2006).

that the FNS proffered in its notice and to the court sufficient to uphold its good cause finding.²⁶¹

On closer examination of the court's findings, however, the reasons justifying the FNS's good cause finding appear to be suspect. First, the court found it significant that Congress gave the FNS some discretion to issue an interim rule; however, the Reauthorization Act never explicitly exempted such a rule from notice and comment procedure.²⁶² Second, the court reasoned that the interim rule needed to be implemented quickly to provide guidance on how to implement the new provisions of WIC.²⁶³ This is no justification, however, since courts have repeatedly held that the "desire to provide immediate guidance, without more, does not suffice for good cause."²⁶⁴ Third, the court found that the interim nature of the rule supported the agency's good cause finding.²⁶⁵ However, the relevance of the rule's interim status to the agency's good cause claim is never explained, and precedent in the D.C. Circuit holds that "the limited nature of the rule cannot in itself justify a failure to follow notice and comment procedures."²⁶⁶ Fourth, the court found that the FNS's willingness to receive posteffective public comments "partially cured" the agency's failure to engage in prior notice and comment.²⁶⁷ While some courts have used this factor as support for upholding an agency's good cause finding,²⁶⁸ an invitation for posteffective comments can be at most a supplemental, rather than primary, reason justifying the agency's use of the good cause exception.

The last remaining ground for the court's holding is the only defensible one. The *National Women* court held that the specific time line set by Congress for implementing the WIC cost-containment provisions weighed in favor of the agency's good cause finding.²⁶⁹ Specifically, the court found that a "deviation from APA requirements has been permitted where congressional deadlines are very tight and where the statute is particularly complicated."²⁷⁰ However, the court recognized that the congressional deadline here was not as pressing as in other cases, noting that the FNS had eighteen months from the enactment of the statute to the date of its implementation.²⁷¹ But, the court also took into account the fact that the FNS had

²⁶¹ *Id.* at 108.

²⁶² *Id.* at 106.

²⁶³ *Id.* at 107.

²⁶⁴ *United States v. Cain*, 583 F.3d 408, 421 (6th Cir. 2009) (quoting *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979)) (internal quotation marks omitted).

²⁶⁵ *Nat'l Women*, 416 F. Supp. 2d at 107-08.

²⁶⁶ *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 582 (D.C. Cir. 1981).

²⁶⁷ *Nat'l Women*, 416 F. Supp. 2d at 107-08.

²⁶⁸ See *supra* note 232 and accompanying text.

²⁶⁹ *Nat'l Women*, 416 F. Supp. 2d at 106.

²⁷⁰ *Id.* (quoting *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994)) (internal quotation marks omitted).

²⁷¹ *Id.*

not been dilatory in issuing the interim rule and found it was “highly doubtful that the FNS could have published its interim rule by December 30, 2005, if it had undergone the notice and comment rulemaking procedure.”²⁷²

This last reason nicely accords with the third prong of this Comment’s proposed Section 553(b)(B): good cause is warranted where “delay in implementing the rule would substantially frustrate legislative policies.”²⁷³ While the *National Women* court did recognize this ground as supporting a good cause finding, the court was also engaged in consideration of several other factors that ultimately should be irrelevant to a good cause determination. The value of this Comment’s proposed language is that it would help narrow the inquiry for courts in separating the truly relevant factors in a good cause evaluation from the irrelevant, distracting, and unhelpful. The amended language alone would suffice to provide grounds for the court’s reasoning, and the court in turn would not have to resort to finding reasons outside the statute, grasping for the ambiguous “totality of the circumstances” to come to a well-reasoned holding.

The newly proposed language of Section 553(b)(B), along with a *de novo* standard of review and the accompanying recommendations, will go a long way toward clarifying the appropriate situations under which good cause will allow an agency to dispense with the notice and comment procedure. This will in turn help avoid confusion in judicial opinions such as the ones examined here, conserving resources and lowering costs for both federal agencies and courts alike.

CONCLUSION

Federal agencies issue far more legally binding legislative rules every year than Congress, yet agencies are not representative or publicly accountable. Yet, agency rulemaking remains ever prevalent and shows no signs of abating any time soon. In order to alleviate the problems associated with delegating administrative authority to unrepresentative agencies, Congress enacted a number of procedural requirements under the APA to enhance agency transparency, efficiency, and procedural fairness.²⁷⁴ As a result, adherence to the notice and comment requirements under Section 553 for informal rulemaking serves more important purposes than mere technical compliance. Notice and comment rulemaking at its essence manifests the ideal of self-governance through participatory democracy. The results are wiser and fairer rules that foster greater public confidence in federal agencies, enhancing their political legitimacy and accountability. These proce-

²⁷² *Id.* at 107.

²⁷³ See *supra* note 215 and accompanying text.

²⁷⁴ See Criddle, *supra* note 207, at 1276.

dures also permit public officials to discharge their fiduciary obligations to members of the public fairly and reasonably.

With these values in mind, the good cause exception under Section 553(b)(B) should be treated as truly that—an *exception* to be used sparingly and only with real justification. As we have seen, administrators should not be entrusted to exercise self restraint in this regard, as they are frequently more concerned with implementing policy objectives than with adhering to the finer points of procedural fairness. Agencies require the constraints that can only be provided by the rule of law in order to vindicate the values of public participation in rulemaking. Otherwise, we are all vulnerable to the arbitrary actions of the modern administrative state.